Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996	)	CC Docket No. 96-187
	)	
	)	

OPPOSITION

BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth) hereby submit their opposition to the Petitions for Reconsideration filed by AT&T Corp. ("AT&T") and MCI Telecommunications Corp. ("MCI") in the above referenced proceeding.

I. INTRODUCTION

AT&T and MCI request the Commission to reconsider several aspects of its order that prescribed rules implementing the LEC streamlined regulation provision of the Telecommunications Act. While both AT&T and MCI urge the Commission to make some procedural modifications, their most significant objection to the Commission's order concerns the Commission's construction of the statutory requirement that LEC tariff filings shall take effect and be deemed lawful unless the Commission acts to suspend and investigate the filing.[1] As discussed more fully below, neither petition presents any basis for the Commission to reconsider its decision.

[1] *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996,* CC Docket No. 96-187, released January 31, 1997, (*"Order"*).

II. THE COMMISSION CORRECTLY CONSTRUED THE STREAMLINED PROVISION

The Telecommunications Act of 1996 amended Section 204 of the Communications Act by adding a provision that states that any new or revised charge filed by a local exchange carrier "shall be deemed lawful and shall be effective... unless the Commission takes action under paragraph (1)...."[2] In its order, the Commission construed the "shall be deemed lawful" phrase of the new statutory provision to mean that a LEC tariff that is filed under the terms of this provision and that is not suspended or investigated, shall take effect and is conclusively presumed to be reasonable and, thus, lawful during the period in which the tariff remains in effect.[3]

MCI and AT&T object to the Commission's determination. Both claim that there is nothing in the language of the statute that permits the Commission to construe the term "shall be deemed lawful" as being a conclusive presumption. In essence, they argue that the statute is ambiguous, and that the Commission must look elsewhere to discern congressional intent. As more fully discussed below, there is no ambiguity in the statute and the Commission's construction of the statutory provision is the only permissible interpretation.

The Commission first concluded that appellate courts have found that the term "deemed" is unambiguous and, in construction of federal statutes, generally found to convey a conclusive presumption.[4] In support of its conclusion, the Commission cited two energy cases, *Municipal Resale Service Customers v. Federal Energy Regulatory Commission*[5] and *Ohio Power Company*

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2 47 U.S.C. § 204 (a)(3).

3 Order at ¶ 19.

4 Order at ¶19.

5 43 F.3d 1046 (6th Cir. 1995).

v. Federal Energy Commission.[6] AT&T contends that these cases are inapposite because they concern the effect of one agency's ratemaking determination on the jurisdiction of another agency. AT&T misses the point.

In both of these cases, the Courts noted and followed the well established principle that in construing federal statutes, the courts have found the term "deem" to create a conclusive presumption. Having found the term "deem" to be unambiguous, the Courts then applied this determination to the facts at issue in the energy cases. Thus, the Courts' fundamental legal conclusion that the term "deem" is unambiguous is not related to or dependent upon the specific controversies presented in these cases.

Nevertheless, AT&T and MCI attempt, without success, to create an ambiguity over the meaning of the term "deemed". Both purport to present cases where the term "deemed" was found not to create a conclusive presumption but rather a rebuttable presumption. In all other cases cited by AT&T and MCI, either the specific statutory provision being construed had a limiting condition or the statute itself had another express provision that operated to constrain the term "deemed".[7] In the instant case, there are no conflicting statutory provisions or limiting conditions in the Communications Act.

In determining the meaning of a statute, the starting assumption is that legislative intent is expressed by the ordinary meaning of the words used. When the words themselves are clear, Courts are obliged to apply the plain and ordinary meaning of words, rather than hypothesis

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6 954 F.2d 779 (D.C. Cir. 1992).

7 In Attachment 1, BellSouth sets forth a brief explanation showing that the cases cited by AT&T and MCI do not support their argument that there is an ambiguity in Section 204(a)(3).

derived from speculation and surmise.[8] Further, where, as in the case here, the language of the statute is unambiguous, a Court will only look beyond the plain meaning of the statute if such construction would lead to absurd results or thwart the purpose of the overall statutory scheme.[9] Neither AT&T nor MCI have shown nor can they show such an effect in the instant case.[10]

The statutory provision causes change. It is that fact that MCI and AT&T perceive as unintended results. Thus, MCI, for example, argues that under the new provision, a Commission order not to suspend and investigate would have to be considered a final order subject to judicial review. MCI goes on at length as to why the order would be final. There is no dispute that such an order would be final. Where MCI is incorrect is that such a change would have disruptive administrative consequences and thus, could not be consistent with Congressional intent.[11] Quoting Southern Railway,[12] MCI observes that because decisions not to suspend were considered by the courts as non-reviewable, agencies did not have to explain their actions regarding each component of the proposed tariff. MCI overlooks that the form of regulation has changed considerably from the rate-of-return/cost-of-service regulation that was prevalent when Southern Railway was decided and that the Commission has far greater regulatory flexibility

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8 *See Palestine Information Office v. Schultz*, 674 F. Supp. 910 (D.D.C. 1987) *aff'd* 853 F. 2d 932 (D.C. Cir. 1988).

9 *See Solberg v. Inline Corp.*, 740 F. Supp. 680 (D. Minn.).

10 MCI's suggests that interpreting "deemed lawful" as a conclusive presumption would lead to the irrational result that incumbent LEC tariffs that are deemed lawful would not be subject to damage awards under the complaint process while competitive LECs would. MCI at 12. The Commission's construction of the statute does not lead to such a result. Section 204(a)(3) by its express terms applies to all LECs incumbent and new entrant alike. The result postulated by MCI is one of MCI's fabrications and has absolutely nothing to do with the statute or the Commission's order.

11 MCI at 12.

12 *Southern Railway Co. v. Seaboard Allied Milling Corp. et. al.*, 442 U.S. 444 (1979).

including statutory forbearance all of which lessen the Commission's workload. Further, the statutory provision only applies to LECs. Thus, only a single class of common carrier that the Commission regulates is affected by the new statute. Accordingly, the administrative consequences are not as dire as claimed by MCI.[13]

While these parties lament over the fact that damages would be unavailable in a complaint proceeding against a LEC tariff filing that is "deemed lawful," they provide no basis for reconsideration of the Commission's order. When the Commission prescribes a lawful rate (after an investigation) it is acting in a legislative capacity, upon authority delegated to it by Congress.[14] Once the Commission so acts, the carrier cannot be held liable for damages. Under Section 204(a)(3), when a tariff is "deemed lawful" by operation of the statute, Congress has acted directly rather than through delegation and the effect of Congress' direct act can be no less than that of the Commission's legislative act taken pursuant to delegated authority.

MCI and AT&T's petitions distill to a single contention--their belief that Congress could not have intended to change the way in which tariff filings are processed and treated under the Communications Act. But, as even AT&T acknowledges,[15] there is simply no legislative history to contradict the plain language of the statute as the full and unambiguous expression of Congressional intent. AT&T's and MCI's incredulity notwithstanding, it is apparent that Section 204(a)(3) is a complement to other aspects of the Telecommunications Act that introduced competition into the local exchange market. Indeed, such a nexus is obvious in the fact that

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13 Even if the Commission's workload increased, such an increase would not justify the Commission's failure to implement the plain language of Section 204(a)(3).

14 *Arizona Grocery Co. v. Atchison, T. & S.F.*, 284 U.S. 370, 388 (1932).

15 AT&T at 8.

Section 204(a)(3) only applies to local exchange carriers, while Title II rate regulation applies to all common carriers.

Even more compelling is the fact that if the term "deemed lawful" were interpreted to mean a rebuttable presumption of lawfulness as advocated by MCI and AT&T, then the statutory provision would be rendered superfluous. Prior to the enactment of Section 204(a)(3), any tariff that took effect without suspension or investigation was presumed lawful and, hence, the legal rate which could then later be rebutted and challenged. In effect, AT&T and MCI argue that the Commission interpret away the statutory change made by Congress. Such a result would be impermissible.[16]

III. THE COMMISSION NEED NOT RECONSIDER ANY OF ITS ADMINISTRATIVE RULES

MCI requests the Commission reconsider its determination regarding the use of protective orders in streamlined tariff proceedings. MCI claims that permitting cost support to be filed under confidential cover is inconsistent with the Commission's rules requiring that carriers file public cost support data.[17]

In the first instance, any data that the Commission may require a carrier to file in support of a tariff filing is for the benefit of and as an aid to the Commission in its exercise of its statutory responsibilities. There is no right of access to such data by the public.

To the extent the Commission permits the public to review such data, the Commission has the discretion and authority to determine the extent to which such data may be viewed. There

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[16] *See Sutton v. U.S.* 819 F.2d 1289 (5th Cir. 1987) (When Congress enacts a statute it is assumed that Congress intends it to have meaningful effect and should, accordingly, be construed so as to give it such effect)

[17] MCI at 16.

was an ample record in this proceeding that demonstrated that the type of data that accompanies new service filings made by LECs is confidential business information and is competitively sensitive.[18] Accordingly, the Commission properly took steps that would protect the confidentiality of these data.

Contrary to MCI's petition, the procedures established by the Commission are not inconsistent with the Commission's rules that data accompanying tariff filings be available to the public.[19] The Commission's rules already permit the means by which such data can be withheld from public inspection. In adopting the protective order approach for LEC streamlined filings, the data is not completely withheld from the public as the Commission's rules permit, but instead provides the conditions upon which interested members of the public may obtain and use the data. Nowhere does MCI suggest the Commission is without the authority to establish such conditions.

Next, MCI urges the Commission to clarify that LECs may only file exchange access tariffs on streamlined basis pursuant to Section 204(a)(3). The Commission must decline making such a clarification. Section 204(a)(3) is clear and unambiguous:

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[18] MCI is just wrong in its assertion that data should only be considered competitively sensitive if particular levels of competition can be demonstrated. No doubt MCI Metro, as a new local entrant, considers its data and market research competitively sensitive notwithstanding the achieved levels of competition. The same factors pertain for the incumbent. Providing the incumbent's data, without condition, is merely providing new and potential competitors with information by which they can target their entry strategies. Competition does not require competitors to share such data.

[19] Even if the rules regarding LEC tariff filings were inconsistent with the general rules regarding data accompanying tariff filings, MCI has failed to show any legal basis that would require the two sets of rules to be consistent. The rules establishing the protective order approach pertain to streamlined LEC filings made under a statutory provision that applies only to LECs. There is nothing in the Communications Act that prevents the Commission from establishing specific rules that are not only unique to one class of carrier but also different from the rules applicable to common carriers in general.

> a local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis.

The statute does not contain the limitation that MCI advocates[20] and the Commission is not free to change the express terms of the statute.

Both MCI and AT&T urge the Commission to adopt a rule that would require LECs to file a Tariff Review Plan in advance of any tariff filing when there is a mid-year exogenous change.[21] While MCI is silent as to precise time frames, AT&T suggests a thirty day period. As AT&T acknowledges, the issue was not addressed in the rulemaking proceeding. Hence, the issue is not properly before the Commission on reconsideration.

In the event, however, that the Commission considers the issue, it should deny AT&T's and MCI's request. In requiring the advance filing of the TRP for the annual filing, the overwhelming factor considered by the Commission was that the annual filing had always been made on ninety days notice and that the new statutory provision shortened the review period to fifteen days. The same circumstance does not apply to mid-year changes. Prior to the enactment of the streamlined provision, mid-year adjustments by LECs to their PCI's could be effectuated by rate changes that were filed on 14 days notice. Accordingly, there has never been an extended

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[20] MCI mistakenly believes that the definition of local exchange carrier within the Communications Act provides a basis for the Commission to limit the scope of Section 204(a)(3). The definition of local exchange carrier enables the Commission to determine which common carriers are local exchange carriers for the purposes of applying the Communications Act, *i.e.*, carriers that provide telephone exchange service or exchange access service. Nothing in the definition, however, limits a local exchange carrier to providing only telephone exchange service or exchange access service.

[21] MCI at 20; AT&T at 13.

review period associated with mid-year PCI changes. The implementation of Section 204(a)(3) clearly provides no excuse to create a new regulatory requirement.

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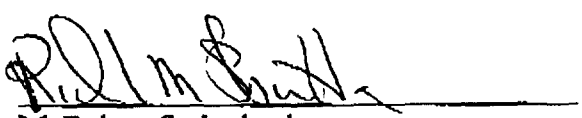
For the reasons discussed above, the Commission should deny MCI's and AT&T"s petitions.

Respectfully submitted,

BELLSOUTH CORPORATION
BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

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Attachment 1

Lavine v. Milne, 424 U.S. 577 (1976)--The statute at issue provided that anyone applying for home relief or aid to dependent children within 75 days after voluntarily terminating his employment or reducing his earning capacity "shall, unless otherwise required by federal law or regulation, be deemed to have voluntarily terminated his qualifying for such assistance or a larger amount thereof, **in the absence of evidence to the contrary supplied by such person.**" (424 U.S. at 579). Thus, the statute expressly provides an opportunity to an applicant to demonstrate that he did not terminate his employment for the purpose of qualifying for relief. A similar express provision is not present with Section 204(a)(3) of the Communications Act.

Conoco, Inc. v. Skinner, 970 F.2d 1206 (3rd Cir. 1992)--The case involves the complex statutory scheme regulating the ownership, operation, and chartering of vessels in coastwise trade. Section 2 of the Shipping Act provides "[w]ithin the meaning of this chapter no corporation, partnership, or association shall be deemed to be a citizen of the United States unless the controlling interest therein is owned by citizens of the United States...but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum. 46 U.S.C. App. @ 802 (1988)." (970 F.2d at 1209) Section 9 of the Shipping Act incorporates the citizenship requirements in Section 2 such that it is a violation of Section 9 to transfer a vessel owned by a U.S. citizen to a non-citizen with approval of the Secretary of Transportation. (970 F.2d at 1210) Section 2's citizenship requirement is also incorporated in Section 27 of the Merchant Marine Act which specifies that no merchandise shall be transported by water between points in the U.S. except in vessels owned by persons who are citizens of the United States. (Id.) In 1958 the Merchant Marine Act was amended by the Bowaters Amendment which created a narrow exception to the citizenship requirements. The amendment allows corporations not meeting the citizenship requirement, who otherwise qualify, to register vessels for coastwise trade, provided that the vessels are only used to carry "'proprietary" cargo owned by either the corporation or its affiliates. (Id.)

In the instant case Conoco was acquired by Du Pont. As a result of Du Pont's acquisition of Conoco, more than 25 percent of Du Pont's stock was acquired by non-U.S. citizens. Du Pont notified the Department of Transportation that it could no longer certify that it was not 75 per cent owned by U.S. citizens. Du Pont argued, however, that U.S. citizens continued to hold a controlling interest in Du Pont, and thus, its wholly-owned subsidiary, Conoco, continued to be owned by an U.S. citizen under Section 2, and thus, could engage in coastwise trade even though Du Pont could not.

The Court upheld a Maritime Administration regulation that applied the 75 per cent citizenship requirement of Section 2 of the Shipping Act to the parent company as well as any subsidiary involved in coastwise trade. (970 F.2d 1222)

Conoco also argued that the Bowaters amendment deems a Bowaters corporation to be a U.S. citizen and thus, is a constructive citizen and can charter vessels (rather than own) from other corporations for the carriage of non-proprietary cargo for hire. In other words, that Conoco could accomplish indirectly what it could not accomplish directly through Section 2, compete against U.S. vessels in the coastwise trade. (970 F.2d at 1223). The specific statutory provision stated "Notwithstanding any other provision of law, a corporation incorporated under the laws of

the United States or any State... thereof, shall be deemed to be a citizen of the United States for the purposes of and within the meaning of that term as used in [Sections 9 and 37 of the Shipping Act...Section 27 of the Merchant Marine Act]...(Id.) Conoco argued that the "Notwithstanding" clause meant that it should be deemed a U.S. citizen for all purposes. The Court rejected Conoco's interpretation of the notwithstanding clause because such an interpretation would render the Section 2 citizenship requirement meaningless. (970 F.2d at 1224) Thus, the Court interpreted the "shall be deemed a U.S. citizen" portion of the amendment so as to effectuate a limited exception to the citizenship requirement of Section 9 of the Shipping Act. (970 F.2d 1225)

The Court, thus, interpreted conflicting statutory provisions to give maximum effect to all provisions. Under the Communications Act, however, there is no conflict between statutory provisions.

Davis v. Calfiano, 603 F. 2d 618 (7th Cir. 1979)-- The case involved the payment of widow's insurance benefits under the Social Security Act. Section 416(h)(1) of the Social Security Act provides that an "applicant [who] went through a marriage ceremony with (the wage earner)...but for a legal impediment not known to the applicant at the time of such ceremony ... such marriage shall be deemed to be a valid marriage. The provisions of the proceeding sentence shall not apply (i) if another person...is (or is deemed to be) a...widow...of the such insured individual under subparagraph (A)...." (603 F.2d 621). As the Court explained, "the explicit language of Section 416(h)(1)(B) provides that the deemed spouse provision does not operate if the legal widow under Section 416(h)(1)(A) 'is or has been entitled to the benefit.'" (603 F.2d at 626)
Thus, in *Davis*, the term deemed is not ambiguous. Instead, the statute expressly establishes a condition, the occurrence of which overrides the presumption of a deemed spouse. There is no similar statutory condition in Section 204(a)(3) of the Communications Act.

D.B. Coal Company v. Farmer, 613 S.W. 2d 853 (Supreme Ct. Ky. 1981)--The case involved Kentucky's no fault automobile insurance law. One section of the law (KRS 304.39-060(1)). provides that any person who uses a motor vehicle on the public roadways of the state shall be deemed to have accepted the provisions of the act. The same statute, however, provides that "every person suffering loss from injury arising out of maintenance or use of a motor vehicle has a right to basic reparation benefits, unless he has rejected the limitation upon his tort rights as provided in KRS SECTION 304.39-060(4)." (KRS section 304.39-030(1))
Thus, in *DB Coal*, the Court's holding merely reflects the operation of the entire statute that indicates that before a presumption that a person uses the highways has accepted the law can be imposed, there must be an opportunity for that person to demonstrate that he has rejected the statutory tort limitations as permitted by the Kentucky no-fault law. It is not that the term "deem" was considered ambiguous and interpreted by the Court to be a rebuttable presumption. Rather, it is the express provisions of the Kentucky no-fault law and their interoperation that creates the rebuttable presumption. There is nothing in the statutory framework of the Communications Act that is similar to the Kentucky no-fault statute.

Rayle v. Rayle, 202 S.E. 2d 286 (Ct. of App. N.C. 1974)--the case involved an interpretation of the North Carolina statute regarding alimony. The provision in question stated that "a husband is

deemed to be the supporting spouse unless he is incapable of supporting his wife." (202 S.E. 2d at 287) The Court construed this provision as a rule of evidence "that will be taken for granted that a husband is the supporting spouse until the contrary is shown." (202 S.E. 2d at 289) The Court explained that "[a] different construction would render meaningless many portions of the 1967 act, particularly the provisions of Subsections (3) and (4) of G.S. 50-16.1 defining 'dependent spouse' and 'supporting spouse,' and contravene the manifest purpose of the General Assembly." (Id.)
Rayle is, thus, clearly distinguishable from the statutory provision in the Communications Act. Unlike *Rayle*, Section 204(a)(3) does not conflict with other provisions of the Communications Act and the conclusive presumption afforded to LEC tariff filings by that Section does not interfere with the operation of the other ratemaking and tariff provisions of Title II as to other common carriers.

Zimmerman v. Zimmerman, 153 P. 2d 293 (S. Ct. Ore. 1945)--the case involved the resident status of a member of the armed forces in a divorce proceeding. At issue was the construction of the following provision of the Oregon constitution: "No soldier, seaman, or marine in the army, or navy of the United States, or of their allies, shall be deemed to have acquired a residence in the state in consequence of having been stationed within the same ;" (153 P. 2d at 300). The issue before the Court was to interpret the provision in light of the clause "in consequence of'. The Court concluded that the provision should be construed "as if the word 'merely' were inserted immediately before the words 'in consequence of' and that such constitutional provisions do not prevent the acquisition of domicile by a soldier under the rules of the common law as set forth in the Restatement of Conflict of Laws." (155 P. 2d)
In contrast to *Zimmerman,* Section 204(a)(3) does not contain a qualifying clause such as the Oregon constitution and, thus, there is no limitation on the term "shall be deemed."

Erickson v. Erickson, 115 P. 2d 172 (S. Ct. Ore. 1941)--The case involved construction of Oregon statutes relating to joint tenancy. In 1854 the Oregon legislature passed an act that included the following: "Section 38: Joint tenant or tenant in common ...may maintain an action against his co-tenant...for receiving more than his just share of rents or profits of the estate owned...as joint tenants, or tenants in common." (115 P. 2d at 173) The legislature also enacted Section 9 which provided that "[e]very conveyance ...of land made by two or more persons...shall be construed to create a tenancy in common in such estate, unless it be expressly declared in such conveyance or devise, that the grantees or devisees shall take the lands as joint tenants." (Id.) In 1862 the Oregon legislature repealed Section 38 and enacted in its stead the following: "A tenant in common may maintain.....and joint tenancy is abolished, and all persons having an undivided interest in real property are to be deemed and considered tenants in common ." (Id.) Section 9 was not repealed. (115 P. 2d at 174). The Court was faced with a statutory amendment that abolished joint tenancy but that did not repeal the statutory provision that permitted a conveyance to be expressly declared a joint tenancy. The Court concluded that "[i]n view of the presumption that the earlier act was not repealed by the latter and of our consequent duty to attempt a harmonious construction of the two sections, we must conclude that although technical joint tenancy is abolished, nevertheless the right of testators and grantors...to effectuate their intention by express words still exists....The two sections construed together might be read: Joint tenancy is abolished and all persons having an undivided interest in real property are to be deemed and

considered tenants in common except where the right of survivorship is expressly declared....The same result is reached by construing the word 'deemed' as creating a rebuttable rather than conclusive presumption." (115 P. 2d at 177-178)
The key fact in the *Erickson* case is that the Oregon statute contained a conflict and, under the rules of statutory construction, it was necessary for the Court to construe to statute so as to give maximum effect to all of the statutes provisions. The fact of statutory conflict does not pertain to Section 204(a)(3) of the Communications Act.

Brimm v. Cache Valley Banking Co., 269 P. 2d 859 (S. Ct. Utah 1954)--The case involved the transfer of water rights when land is conveyed. In this case, there are two pertinent statutory provisions. The first states that "a right to use water appurtenant to the land shall pass to the grantee of such land...; provided that any such right may be reserved by the grantor in any such conveyance." The second statutory provision originally stated that " water rights shall be transferred by deed in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation..." (269 P. 2d at 861) The second statutory provision was amended such that the exception clause read "except when they are presented by shares of stock in a corporation, in which case water shall not be deemed to be appurtenant to the land." (269 P. 2d at 863) In construing the amended clause "shall not be deemed to be appurtenant" the court concluded that the term established a rebuttable presumption in order to harmonize the provision with the fact that water rights could be considered by the grantor and grantee as appurtenant and that the grantor intended to convey such rights. The Court explained that "the 1943 amendment merely obviated the necessity for a grantor, who owned a water right represented by shares of stock in a corporation but who did not desire to transfer that water right to the grantee of the land upon which the water right was being used, to make an express reservation of that water right in the deed. But the amendment does not foreclose the water right from passing if the grantee can show such was the intention of the grantor." (269 P. 2d at 864) The *Brimm* case is similar to other previously discussed cases where the particular construction was to harmonize multiple statutory provisions. In the *Brimm* case, the Court did not perceive the legislative intent was to interfere with the intention of the contracting parties over the control of the conveyance of land and water rights. Without question the circumstances of the *Brimm* case are inapposite to the construction of Section 204(a)(3) of the Communications Act.

Miller v. Commonwealth, 2 S.E. 2d 343 (S. Ct. Va. 1939)--This case involves the interpretation of the Virginia Code. The first paragraph of the section at issue makes it a misdemeanor to be in possession of illegally acquired liquor. The second paragraph states that "Spirits in the possession of any person and in containers not bearing required government stamps or seals shall be deemed for the purposes of this act to have been illegally acquired." The third paragraph provides that "alcoholic beverages...not bearing stamps...or other evidence that the tax due...has been paid, shall be deemed for the purposes of this act to have been illegally acquired." The Court considered the first paragraph as defining the offense and the second and third paragraphs as declaring rules of evidence to establish essential elements of the offense. (2 S.E. 2d at 346) In construing the statute and the operation of the term "deemed" in the second and third paragraphs, the Court was mindful of the fact that a criminal defendant under the Virginia constitution had the right to call for evidence in his favor and to testify in his own behalf. (2 S.E. 2d at 348) Thus, the Court could not conclude that the term established a conclusive presumption. As the Court stated,

"under the peculiar circumstances here involved, it is fair, reasonable and proper to hold that the language of the statute under review merely creates a presumption subject to be overcome with opposing or contradictory evidence." (2 S.E. 2d at 349 emphasis added)
Section 204(a)(3) does not give rise to the "peculiar" circumstances that were present in the *Miller* case.

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of April, 1997 served the following parties to this action with a copy of the foregoing **COMMENTS** by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.

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